No. 811

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1964

CHARLES WILSON TENNANT,
(A.K.A.)
HERBERT C. ENGLE,
Petitioner,

vs.

JOHN R. SHRIVER, TRUSTEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

~~BRIEF IN SUPPORT OF PETITION, APPENDIX~~

ERNESTINE B. POWELL,
17 S. High Street,
Columbus, Ohio.
JOHN J. CONNORS, JR.,
10 E. Town Street,
Columbus, Ohio.
FORREST L. BLANKENSHIP,
5-6 Masonic Temple Bldg.,
Troy, Ohio.
Attorneys for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States.

Herbert C. Engle, Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit

entered in the above cause on September 21, 1964, affirming the judgment of the United States District Court for the Southern District of Ohio, Western Division denying petitioner's motion to vacate and set aside a default judgment in the amount of $450,000.

OPINIONS BELOW

The Trial Court, the United States District Court for the Southern District of Ohio, Western Division, issued a memorandum opinion and order on June 13, 1963 in Case No. 5363. The decision has not been reported as yet. The United States Court of Appeals for the Sixth Circuit issued its decision affirming the trial court on September 21, 1964 in Case No. 15,604.

The decision of the District Court was affirmed by the Court of Appeals without opinion on September 21, 1964.

JURISDICTION

This cause was argued before the United States Court of Appeals for the Sixth Circuit on April 17, 1964. The judgment of that Court was entered on September 21, 1964. On that date the Court of Appeals denied the petitioner's appeal and affirmed the trial court on the ground that the appeal was without merit.

The jurisdiction of this Court is invoked under Section 1254, Title 28, United States Code.

The questions presented here were raised in the Trial Court, and in the Court of Appeals.

REASONS FOR ALLOWANCE OF THE WRIT

Despite the fact that the courts below denied the petitioner's motion to vacate and set aside the default judgment taken against him while an inmate of a Federal

Reformatory there has never been a determination on the assertion of "Excusable Neglect" made by the petitioner in support of his motion. Thus, for the purpose of determining the constitutionality of the proceedings taken in the District Court, the petitioner has never had a judicial resolution on the assertion of the ground of excusable neglect made in support of his motion. It is submitted as fundamental that the basic constitutional prerogatives of notice and an opportunity to be heard were not afforded to the petitioner.

I. STATEMENT OF FACTS

On May 12, 1960 the complaint in the present case was filed against three defendants, Charles Wilson Tennant, (A.K.A.), Herbert C. Engle, Jean Engle, and Barbara W. Ellis alleging that the defendants had jointly conspired to defraud creditors in a bankruptcy action pending before the court. The complaint prayed for the conveyance of three properties in Tyler, Texas as well as for the conveyance of furniture, fixtures, supplies and equipment, and any other property which was purchased or acquired with the money or assets of King Bee Leasing Corporation or which properly belongs to King Bee, and any other property into which said property may have been converted. The complaint also asked for a judgment against the defendants for the difference between the amount of One Million One Hundred Thousand Dollars ($1,100,000.00) and the value of any property reconveyed to the plaintiff in accordance with the above mentioned prayer of the complaint.

On May 12, 1960 all three of the defendants were personally served with a summons in the present action. The defendant, Tennant, (A.K.A.) Engle, was served with a summons while he was in the custody of the Marshall

awaiting conveyance to a federal reformatory to serve a criminal sentence.

On May 31, 1960 answers were filed and appearance entered by attorneys on behalf of the defendants Jean Engle and Barbara Ellis, however, no answer was filed on behalf of defendant Tennant, (A.K.A.) Engle, nor was an appearance entered on his behalf by an attorney. The defendant Tennant, (A.K.A.) Engle, was an inmate of the Milan, Michigan Federal Reformatory on this date.

On November 7, 1961 a default was entered against the defendant Tennant, (A.K.A.) Engle, on the Civil Docket of the Court.

On November 8, 1961, a motion for default judgment was filed by the Respondent herein against the Petitioner Tennant, (A.K.A.) Engle.

On November 9, 1961 a hearing was held on the motion for default judgment and on December 1, 1961 a default judgment was entered against the Petitioner Charles Wilson Tennant, (A.K.A.) Herbert C. Engle for the sum of $450,-000, and on this date a copy of the judgment was mailed to the Petitioner Tennant, (A.K.A.) Engle, at the Milan, Michigan Federal Reformatory.

On November 30, 1962 a motion to set aside the default judgment together with an answer to the complaint was filed by the Petitioner, Charles Wilson Tennant, (A.K.A.) Herbert C. Engle, who had been discharged from the federal reformatory.

On August 8, 1963 the motion to set aside the default judgment was denied by the court. (Appendix G)

II. QUESTION PRESENTED

IS THE PETITIONER ENTITLED TO RELIEF UNDER THE PROVISIONS OF RULE 60 (b) OF THE FEDERAL RULES OF CIVIL PROCEDURE?

THE PETITIONER, ANSWERS THE QUESTION IN THE AFFIRMATIVE.

III. LAW

The present motion was made pursuant to Rule 60 of the Federal Rules of Civil Procedure, paragraph (b), which provides as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertance, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it was based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation."

In *Klapprott* v. *U. S.*, 93 L. Ed. 266, 335 U.S. 601, a judgment by default was taken against the defendant in a denaturalization proceeding while he was serving a sentence on a charge of conspiracy to violate the Selective

Service Act and imprisoned because unable to furnish bail. This Court, Black, J., reversed the Circuit Court of Appeals and the District Court's decision dismissing a petition to set aside the default which was brought pursuant to Rule 60 (b), even though said rule became effective after the default judgment was taken. The court held that the judgment was void because entered without requiring proof; that if it was not void, it should be set aside on the ground that the circumstances justified relief as to which the one year limitation provisions attached to relief on the ground of "excusable neglect" does not apply. Rutledge and Murphy, J.J., agreed that the judgment revoking a certificate of naturalization should not have been rendered without requiring proof. Frankfurter, J., agreed with Black, J., that the case should be governed by the liberalizing amendment to Rule 60 (b) of the Federal Rules of Civil Procedure, and that the ground for relief was something other than "excusable neglect" and so not barred by the one year limitation. He differed from his colleagues however, in thinking that before setting aside the judgment the petitioner should be required to satisfy the trial judge of the truth of his implied allegation that the harassing criminal proceedings against him had so preoccupied his mind that he was not guilty of negligence in failing to do more than he initially did in seeking to defend the denaturalization proceeding.

In *Minneapolis Brewing Co.* v. *E. B. Merritt*, 143 F. Supp. 146 (D.C., N.W.D., N.D., 1956), the court granted the defendant's motion filed under Rule 60 (b) to vacate judgment on the grounds of excusable neglect and mistake in that the judgment failed to protect guarantor's interest, and thus was subject to a motion to vacate. In paragraph 4 of the syllabus the court held:

> "Alleged neglect of attorney in permitting default to be entered as a result of confusion in taking over

> practice of former attorney was excusable and warranted setting aside the default judgment, where answer presented substantial issues which could be tried on the merits without unreasonable prejudice to the plaintiff, and where element of mistake was also involved."

In *Alopari* v. *O'Leary*, 154 F. Supp. 78 (D.C.E.D. Pa., 1957), the court granted the defendant's motion to vacate a default judgment in a case where the defendant failed to plead or otherwise defend a suit and default judgment was entered because of inadvertance and excusable neglect of counsel. The court held that:

> "Any doubt should be resolved in favor of setting aside defaults so that cases may be decided on their merits. Tozer v. Krause Milling Co., 3 Cir., 1951, 189 F. 2d 242; Chapman v. Dreer, D.C.E.D. Pa., 1953, 14 F.R.D. 218; Elias v. Pitucci, D.C. E.D. Pa., 1952, 13 F.R.D. 13; Soriano v. American Steamship Corp., D.C. E.D. Pa., 1952, 13 F.R.D. 485. In view of the lack of any substantial prejudice to plaintiff, the claim of a meritorious defense, and the absence of any gross neglect on the part of the defendant, the default will be set aside."

In *Anderson* v. *Taylorcraft*, 197 F. Supp. 872 (D.C. W.D. Pa., 1961), the court denied the defendant's motion to vacate and set aside a default judgment in a case where the plaintiff's claim was for a sum certain and the defendant was defaulted for failure to appear. However, in this case the defendant was properly served with summons, and also served a warning from plaintiff's attorney that its inaction would result in a default judgment, and was also notified by the court that the case was assigned to the non-jury calendar, to which the defendant's attorney responded by letter. There was a two and one-half year period involved in this case before default was entered, however, such facts do not appear in the instant case.

In *Nicholson* v. *Allied Chemical Corp.*, 200 F. Supp. 206 (D.C. E.D., Pa., 1961), the court granted the defendant's motion to set aside a default judgment holding that, "Defendant was entitled to have motion to set aside default judgment granted where default was caused by excusable neglect of clerk of defendant's counsel in failing, contrary to established procedure, to secure from plaintiff's attorney stipulation of time to file answer, defendant's counsel promptly filed motion, and defendant had a meritorious defense."

In *Chapman* v. *Dreer*, 18 F.R. Serv. 60 b 24, Case 2 (D.C. E.D. Pa. 1953), the court granted the motion to set aside a default judgment in a case where the period of delay was short, defendant was guilty, at most of excusable neglect, plaintiff would not be substantially prejudiced and defendant asserted a defense good on its face.

In *Ellington* v. *Milne*, 18 F.R. Serv. 60b 24, Case 1 (D.C. E.D., N.C., 1953), the court granted the motion to set aside a default judgment in a case wherein the defendant failed to plead but filed his motion eleven months and thirteen days after entry of default. The court held in the syllabus that:

> "If a meritorious defense is shown and there are no intervening equities, the court should be liberal in determining what is a justifiable excuse for allowing default to be taken. Setting aside a default is in the discretion of the court. Default was set aside where defendant had forwarded the summons and complaint to her insurance carrier, which was required to defend the action, but the process by some inadvertance had been placed in the closed files."

In the matter of the Estate of Cremidas, 18 F.R. Serv. 60 b 29, Case 3, 15 F.R.D. 15 (D.C.D. Alaska 1953), was another case in which the court granted relief from a default judgment entered as a result of the intoxication

of the moving parties lawyer at the time of the hearing so that he was unable to present the party's case. In this case the court held that a delay of more than three years did not prevent the court from granting relief under Rule 60 (b) where the party resided in a remote portion of Alaska and was unable to obtain other counsel.

In *U. S.* v. *Karahalias,* 18 F.R. Serv. 60 b 29, Case 4, (2nd Cir., 1953), the court reversed the district court's denial of a motion to set aside a default judgment and remanded the case to the district court for further proceedings in accordance with the rule set out in *Klapprott* v. *U. S., supra.* In the syllabus the court held that:

> "Insofar as a motion or proceeding for relief is based upon 'neglect' it must be brought within time limits prescribed by Rule 60 (b). Rule 60 (b) does not give the court a dispensing power over the limitations imposed by the rule on subsections (1), (2) and (3). However, where a motion to reopen a judgment cancelling naturalization was based upon inability of the party to return to the United States to contest the action, the ground was not 'neglect' and under Rule 60 (b) (6) there was no time limit on the motion."

In *Tozer* v. *Krause Milling Co.,* 3 Cir., 1951, 189 F. 2d 242, the court at page 245 of the opinion said:

> "The recent cases applying Rule 60 (b) have uniformly held that it must be given liberal construction. Matters involving large sums should not be determined by default judgments if it can reasonably be avoided. Henry v. Metropolitan Life Ins. Co., D.C. Va., 1942, 3 F.R.D. 142, 144. Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits. Huntington Cab Co. v. American Fidelity and Casualty Co., D.C. W. Va., 1945, 4 F.R.D. 496, 498; Standard Grate Bar Co. v. Defense Plant Corp., D.C. Pa., 1944, 3 F.R.D. 371, 372. Since the interests of justice are best served

by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments. We are of the opinion that the court below applied a standard of strictness rather than one of liberality in concluding that justice did not require that the judgment be set aside."

In *Klapprott* v. *U. S., supra,* this court said:

"It is contended that the 'other reason' clause should be interpreted so as to deny relief except under circumstances sufficient to have authorized relief under the common law writs of coram nobis and audita querela, and that the facts shown here would not have justified relief under these common law proceedings. One thing wrong with this contention is that few courts have agreed as to what circumstances would justify relief under these old remedies. To accept this contention would therefore introduce needless confusion in the administration of 60 (b) and would also circumscribe it within needless and uncertain boundaries. Furthermore 60 (b) strongly indicates in its face that courts are no longer to be hemmed in by the uncertain boundaries of these and other common law remedial tools. In simple English, the language of the 'other reason' clause, for all reasons except five particularly specified, vests power in the courts adequate to enable them to vacate judgments wherever such action is appropriate to accomplish justice."

"Cases of extreme hardship or injustice may therefore come within a more liberal dispensation than a literal reading of the rule would allow. And indeed there is little reason why a motion or application for relief from a judgment should not be considered in the same broad perspective as an independent action to vacate or set aside the judgment." *Barron and Holtzoff, 3 Federal Practice and Procedure, Rules Edition,* at page 269.

In *Teal* v. *King Farms Co.,* 21 F.R. Serv. 55c 1, Case 1 (D.C. E.D. Pa., 1955), the court granted the motion to

set aside the default in a case where the defendant failed to appear, plead, or otherwise defend on the ground that:

> "All that is required to set aside a default is 'good cause' and inadvertance, even though not strictly 'excusable' may constitute good cause, particularly in a case where the plaintiff can suffer no harm from the short delay involved and grave injustice may be done to the defendant."

In *Western Union Telegraph* v. *Dismang*, 106 F. 2d 362, (10th Cir., 1959), the court held at page 364 of the opinion that:

> "An application to open, vacate, or set aside a judgment is within the sound discretion of the court and its action will not be disturbed by an appellate court except for a clear abuse of discretion. It is an abuse of discretion however, to open or vacate a judgment where the moving party shows no legal ground therefore or offers no excuse for his own negligence or default. Here the plaintiff wholly failed to plead or establish any ground for vacating the judgment."

However, in *Commercial Casualty Ins. Co.* v. *White Line T & S Co.*, (8th Cir., 1940), the court reversed the district court's decision denying the plaintiff's motion to vacate a judgment in a case where the plaintiff was in default of answer to counterclaim and cross-claims at the time the case was called for trial and plaintiff was absent through excusable neglect. The court held that:

> "The counter claimants and cross-claimants were required by court rule to cause the plaintiff to be served with a written notice of application for judgment, and failure to give notice was error necessitating reversal, notwithstanding trial court heard evidence and made findings."

In this latter decision the court held that the plaintiff was entitled to notice of the motion for a default judgment

on the counterclaim and cross-claims under Rule 55 (b) (2) where he was in default of answer to the counterclaim or cross-claims. The court also held at page 947 that:

> "The plaintiff being absent through excusable neglect we think there was error in the proceedings and judgment against it because of lack of compliance with the requirements of Rule 55 of the New Rules of Civil Procedure."

In *Perlman* v. *West Seventy-Second Street Co.*, 127 F. 2d 716, (2nd Cir., 1942), the court affirmed the decision of the referee in bankruptcy vacating an order staying and restraining proceedings by creditors against the petitioner except in bankruptcy proceedings in a case where the bankrupt failed to deposit indemnity required before the first creditor's meeting and the bankrupt's estate was closed. In this case the bankrupt had given his attorney sufficient sum to make the deposit, but the attorney failed to make it and was subsequently disbarred, and the bankrupt was unaware of the course of events. The court had previously reversed the district court's decision denying the motions to vacate *In re Perlman,* 116 F. 2d 49 on the ground that:

> "The bankrupt's sole excuse for not having deposited indemnity was not a 'cause' within Bankruptcy Act authorizing reopening of estates for cause shown."

In the later case the court held:

> "Federal Rules of Civil Procedure, Rule 60 (b), does not require a preliminary petition in the appellate court for permission to reopen in the district court. Be that as it may, we concur in the prior determination that the claimed newly discovered facts were insufficient to warrant reopening. Hence it would serve no useful purpose to allow the bankrupt to amend his petition to come within the requirements of the Federal Rules of Civil Procedure, Rule 60 (b)."

In this case the bankrupt was allowed to reopen the proceedings after adjudication because he had failed to deposit the indemnity required. The motion to vacate was made by the creditors opposing the reopening and was ultimately granted on appeal by the Circuit Court on the grounds that it was an abuse of discretion to allow the reopening.

IV. THE QUESTION OF NOTICE

In *Gerber* v. *Fruchter,* 147 F. 2d 120 (2nd Cir., 1945), the court held in affirming the district court's decision reopening a bankruptcy proceeding that:

> "The bankrupt was entitled to reasonable notice of the petition to reopen the bankruptcy proceedings rather than to formal service within the jurisdiction of the court since the new proceedings were purely ancillary to the original action and the venue is that of the original action."

Rule 55 b (2) of the Federal Rules of Civil Procedure provides as follows:

> "By the Court. In all other cases the party entitled to judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served at least 3 days prior to the hearing on such application. If in order to enable the court to enter judgment or to carry it into effect, if necessary to take an account, or determine the amount of damages or to establish the truth of a fact of any averment by evidence or make an investigation of any other matter, the court may conduct such hearings or order such

references as it deems necessary and proper and shall accord the right of trial by jury to the parties when and as required by any statute of the United States."

Rule 5 of the Federal Rules of Civil Procedure provides as follows:

"Service: When Required. Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, demand, offer of judgment, appearance, designation of record on appeal, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear *except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.*" (Italics ours)

It is the appellant's contention that the claim for a default judgment in the instant case was a "new claim" within the meaning of Rule 5 a, and as such the appellant was entitled to service in the manner provided in Rule 4.

Now, in applying the aforementioned doctrine to the present case, we have a situation in which the action filed on behalf of the plaintiff can properly be classified as a proceeding ancillary to the original bankruptcy proceedings. However, the motion for a default judgment which was filed by the attorney for the plaintiff on November 8, 1961, was a new proceeding since it contained a demand for something which was not a part of the original complaint, a demand for a money judgment in the amount of $450,000, against only one defendant, and under the decisions of the Court in *Munter* v. *Weil Corset Co.*, 261 U.S. 476, 43 S. Ct. 347, 67 L. Ed. 119, the defendant-appellant was entitled to ignore the whole proceedings and attack any

default judgment which might result from it. In the instant case since there was a change in the nature of the ultimate relief sought the defendant-appellant was entitled to notice of the plaintiff's motion for a default judgment in the amount of $450,000. In the *Gerber* case, *supra,* the district court granted a creditor's petition to reopen a bankruptcy proceeding and denied the prayer to vacate the discharge because the application was not made within one year. The bankrupt was not given notice of the creditor's application and later appealed on the ground that he was not given notice. The court held that the bankrupt was entitled to the same notice as in adversary proceedings instituted after the original adjudication, and since this was purely an ancillary action arising out of the bankruptcy proceedings, the venue was the same as that of the original action and since the bankrupt was not given notice of the creditor's application the circuit court reversed the district court's decision granting the creditor's application.

In the instant case the motion for a default judgment amounted to more than was requested in the original action in that it was a claim for a sum certain in money, and, as such, formal notice to the defendant was required under Rule 55 (b) (2) and also under the provisions of Rule 55 (a) of the Federal Rules of Civil Procedure.

In *Winhoven* v. *U. S.,* 201 F. 2d 174 (9th Cir., 1952), the court reversed the district court's decision denying defendant's motion to vacate a default judgment under 60 (b) in a case because the defendant was denied participancy in the hearing on his motion to vacate a criminal judgment for denial of due process clause of the Fifth Amendment.

In *Bridoux* v. *Eastern Air Lines,* 214 F. 2d 207 (Ct. of App., D.C. Cir., 1954), the court reversed the district court's decision denying the defendant's motion to vacate a default judgment for $160,000 in a case where defendant's counsel had filed answer setting up defense on the merits in appar-

ent good faith, and had encountered a counterclaim, and because of lack of funds had left the United States and the defendant had not been advised of his counsel's withdrawal. The court held that the district court had abused its discretion in failing to set aside the default since on intervening rights appeared to have been prejudiced, and since a good faith defense on the merits had been put forward by answer.

In *Barber* v. *Turberville,* 218 F. 2d 34 (Ct. of App. D.C., 1954), the court reversed the district court's denial of defendant's motion to vacate a default judgment for $10,000 in a case where the defendant delivered the complaint to attorney who was representing plaintiff's husband in negotiations for settlement of maintenance suit brought by plaintiff, and who inadvertedly failed to file answer to complaint. The court held that:

> "It was not unreasonable for defendant to assure that settlement negotiations also related to the suits against her, and neglect was excusable."

In this case the plaintiff had endorsed upon the complaint a demand for jury trial, and the court held that where such occurs and subsequently plaintiff has a default judgment entered, it is the better practice, if it is not actually required, that issue as to damages be submitted to jury.

In the *Barber* case, *supra,* the court cited with approval the case of *Thorpe* v. *National City Bank,* 274 F. 200, at page 202 wherein the court said:

> "A default by a defendant does not concede the amount of the damages; but only that the plaintiff is entitled to recover some damages. Without plea he is entitled to contest the amount of damages on writ of inquiry."

In *Williams* v. *Blitz,* 226 F. 2d 463 (4th Cir., 1955), the district court's decision denying the defendant's motion

to set aside a default judgment in a case where the defendant failed to file answer before date to which time of answer had been extended and defendant had mailed answer together with a counterclaim the before due. The court held that the delay was due to excusable neglect and counterclaims contained in the answer and relied on as a defense were meritorious.

In *L. M. Leathers' Sons* v. *Goldman*, 252 F. 2d 188 (5th Cir., 1958), the court affirmed the district court's order setting aside a consent judgment and injunction more than a year and a half after entry of the judgment and service of the injunction and thereafter compelled a trial on the merits, under 60 (b). The court held:

> "Rule of Civil Procedure providing that a court may relieve a party from a final judgment for 'any other reason justifying relief from the operation of a judgment' vests power in the court to vacate a judgment whenever such action is appropriate to accomplish justice."

In this case the entry of a consent judgment in a patent infringement case was obtained by promise that plaintiff would grant defendant free irrevocable license, refusal on the part of the plaintiff to carry out its part of the contract by which the judgment was obtained fully justified the court in setting aside judgment and restoring the parties to their status quo, and the district judge did not abuse his discretion in doing so.

In *Rooks* v. *American Brass Co.*, 263 F. 2d 166 (6th Cir., 1959), the judgment of the district court denying the defendant's motion to vacate a default judgment under 60 (b) was reversed by the court of appeals in a case where the defendant's wife was served with process and it was not given to the defendant because of his serious illness, but, instead, was turned over to one who was handling his busi-

ness affairs and who mistakenly believed that it pertained only to bankruptcy proceedings of corporation. The court held that these facts showed mistake of fact and inadvertance and excusable neglect within rules authorizing relief from judgment.

The court also cited the *Tozer* v. *Krause Milling Co.* decision, *supra,* as follows:

> "Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits. Huntington Cab Co. v. American Fidelity & Casualty Co., 4 F.R.D. 496, 498; Standard Grate Bar Co. v. Defense Plant Corp., 3 F.R. D. 371, 372. Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments."

In *Patapoff* v. *Vollstedt's Inc.,* 267 F. 2d 863 (9th Cir., 1959), the court reversed the district court's judgment denying the defendant's motion to vacate a default judgment under 60 (b) (1) and (6) in a case where the defendant made a prompt showing that she had a defense which she was misled into waiving through the alleged erroneous action of her attorney. The court followed the decisions in *Klapprott* v. *U. S., Bridoux* v. *Eastern Airlines,* and *Tozer* v. *Krause Milling Co., supra,* in reaching its decision held that:

> "The rule authorizing the court to relieve a party from a final judgment for mistake, inadvertence, surprise, or excusable neglect or any other reason justifying relief is designed to permit the desirable legal objective that cases may be decided on their merits, and it must be given liberal construction, and only after a careful study of all relevant considerations should courts refuse to open default judgments.

In *General Telephone Corp.* v. *General Answering Service, et al.*, 277 F. 2d 919 (5th Cir., 1960), an action was brought for injunctive relief. A default judgment was entered in favor of the plaintiff. The District Court for the Southern District of Florida, Williams, J., Barker, J., rendered an order denying motion for reargument and rehearing on motion to set aside the default judgment, and the plaintiff appealed. The U. S. Court of Appeals, Hutcheson, Circuit Judge, held that:

> "Where the judgment entered by District Court without a hearing and without proof of any kind, was a completely drastic judgment with wide and comprehensive effect, and if there was in reality a defense to the sweeping claim of plaintiff, it would be a great injustice for judgment to stand, and motion to set aside default judgment showed a good defense to plaintiff's claim, and there were no intervening equities, District Court did not abuse its discretion in vacating default judgment."

In *U. S.* v. *Jacobs*, 298 F. 2d 469 (4th Cir., 1961), the court affirmed the district court's judgment reopening a judgment on its own motion to grant relief sought by intervenors, who were attorneys of the defendants, even though such relief was not requested by motion of original parties seeking modification of judgment. The court held that:

> "The Federal District Court did not abuse its discretion when it ordered that check of plaintiff United States should be endorsed in name of defendant and be cashed, and that sum of proceeds be distributed to intervening attorneys without obtaining release of plaintiff from defendant and certificate of compliance by defendant with patent provisions of contract as required by judgment, where neither release nor certificate of compliance of defendant appeared necessary for protection of plaintiff's interests."

The court held that such procedure was within the court's power to act in the interest of justice in an unusual case in which court's attention has been directed to necessity for relief by means other than motion.

In *Davis* v. *Parkhill-Goodloe Co.,* 302 F. 2d 489 (5th Cir., 1962), the court reversed the district court's decision entering judgment for shipowner in a civil action arising under the Jones Act where defendant's answer was served on plaintiff's counsel but was not filed in court until one day after extended period of time for answer day and the court denied the plaintiff's motion for a default judgment. The court held that:

> "Doubt with respect to grant default should generally be resolved in favor of trial on the merits."

In this case the court properly refused to grant plaintiff a default judgment for untimely filing, but the court of appeals reversed this decision holding that the fact that the answer was not filed on the same day that it was served on the plaintiff constituted excusable neglect and the findings of the court induced by or resulting from a misapprehension of controlling substantive principles lose their insulation of "clearly erroneous" concept, and judgment based thereon cannot stand.

In *Schram* v. *O'Connor et al,* 2 F.R.D. 192 (D.C. E.D. Mich., S.D., 1941), the court granted the defendant's motion to set aside a default judgment on the grounds of excusable neglect in a case where default was entered a little more than two months before defendant filed his petition in bankruptcy, about two months later plaintiff filed his claim in bankruptcy proceedings bearing notation that action had been started and was still pending in Federal District Court, and six months and four days after defendant's discharge in bankruptcy plaintiff took judgment. The court held that the plaintiff was entitled to have default set aside

under procedural rule on ground of "excusable neglect," even though motion to set aside default was tardily made. The court felt that the fact that the plaintiff was pursuing its remedy in bankruptcy was sufficient to cause the defendant to rely on this fact and therefore mislead him and thereby caused the excusable neglect on the defendant's part.

In *U. S.* v. *Mutual Const. Corp.*, 3 F.R.D. 227 (D.C. E.D. Pa., 1943), the court granted the defendant's motion to set aside a default judgment, holding that:

> "A motion to open a default judgment and for leave to file answer, counterclaim and cross-claim on ground of corporate defendant's counsel's negligence occasioned by his engagement in the prosecution of a case for the United States as special assistant to Attorney General, after delivery of summons and complaint to such counsel as set forth, in counsel's affidavit, held that default was not willful, but result of counsel's excusable neglect, so as to entitle defendant to relief prayed."

In *Standard Grate Bar Co.* v. *Defense Plant Corp.*, 3 F. R.D. 371 (D.C. M.D. Pa., 1944), where record disclosed that officers of defendant, moving to have default judgment vacated, believed that representatives of another defendant had arranged for counsel to represent moving defendant and that it learned for the first time that it was not being represented by counsel after judgment had been taken against for want of appearance and answer, and defendant asserted that it had a complete defense, motion was granted under Rule 60 (b).

V. THE EVIDENCE IN SUPPORT OF THE MOTION FOR DEFAULT JUDGMENT

When a person is arrested before a magistrate and he enters a plea of guilty to the charge, and thereafter a civil action is brought against him to recover damages for the same wrong, to entitle the plaintiff to introduce the plea of guilty as evidence in the trial of civil action, the affidavit or a copy thereof, should be first introduced, then it should be shown that the affidavit was read to the defendant, or that he was correctly informed of the contents of the affidavit, and that he entered a plea of guilty to the charge. To permit the magistrate to testify that the defendant was arrested and brought before him, and that he entered a plea of guilty, without showing the charge to which he so plead, is error. *Heeney* v. *Kilbane,* 59 O.S. 499.

In *Trepanier* v. *Toledo & Ohio Central Rwy. Co.,* 102 O.S. 69, the court held that the admission of the defendant that the plaintiff was struck by a train at the time and place alleged in the petition was erroneously considered by the court and held that:

> "A court will not take judicial notice of any fact which is in part dependent upon the existence of a fact of which the court has no constructive knowledge."
>
> "A plea of guilty is admissable not as a judgment establishing fact but as an admission against interest." *Davis* v. *Aetna Life Ins. Co.,* 279 F. 2d 304 (C.A. D.C., 1956)
>
> "The record of a guilty plea, although not factually conclusive is admissable as an admission against interest in civil action against defendant growing out of the same offense." *Vaughn* v. *Jones,* 191 P. 2d 432.
>
> "A plea of guilty is admissible in a civil action, not as a judgment establishing fact but as an admission of party to action." *Rednall* v. *Thompson,* 239 P. 2d 693

"A plea of guilty is regarded as an admission against interest and not as proof of fact in issue." *Ralston* v. *Ralston*. 72 Atl. 2d 441.

"Where defendant in a criminal case pleads guilty, record showing such plea may be admitted in a civil suit against him growing out of the same offense, not as a judgment establishing facts upon which it is based, but as deliberate declaration or admission against the defendant's interest, but like any other admission its probative value may be destroyed by circumstances under which it was given or by satisfactory explanation." *Dimmick* v. *Fallis,* 111 N.E. 2d 486

"A plea of guilty in a criminal case may be accepted as an admission against interest but is not conclusive against defendant in a civil case and may be controverted." *Swigart* v. *Swigart,* 115 N.E. 2d 871, Ct. of App., Montgomery Co., 1955, 65 O.L.A. 582, 112 Ohio App. 521.

"As a general rule, judgment in criminal prosecution may not be received in a civil action to establish truth of facts upon which it was founded, but exception thereto is recognized where defendant has entered a plea of guilty, such record then being admitted not as judgment establishing fact, but as an admission against interest." *Laughlin* v. *Lamar,* 237 P. 2d 1015

VI. SUB-CONCLUSION

The foregoing authorities are cited by the appellant to refute the possible claim of the appellee that there was sufficient evidence before the court to render a default judgment against the defendant in the amount of $450,000.

The great weight of authority is in accord with the rulings of the aforemention decisions, all of which hold that a plea of guilty in a criminal case is not a judgment of fact to be used in a later civil case growing out of the criminal offense; it is an admission against interest, and as such is

subject to be controverted, contradicted, or explained away in the same manner as any other admission and therefore the lower court did not have sufficient evidence before it to render a default judgment against the defendant-appellant in the amount of $450,000.00.

VII. THE ANSWER QUESTION

In the third paragraph of the court's decision there appears the statement that "we are of the opinion that no defense is herein pled as a matter of law, and it is so concluded."

In the answer tendered on behalf of the defendant-appellant at the hearing on August 5th, 1963, three defenses are set forth, they are as follows:

1. "And for his first defense the defendant says that all transfers were for valid corporate purposes, authorized by the Board of Directors, and made on behalf of the corporation."
2. "For his second defense the defendant says that the complaint does not state a valid claim."
3. "For his third defense the defendant says that said claim is barred by the statute of limitations."

The complaint in the instant case sets forth a claim for a judgment in the amount of One Million One Hundred Thousand Dollars, ($1,100,000.00) and also asks for the conveyance of certain property to the plaintiff and for a judgment for the difference between the amount of One Million One Hundred Thousand Dollars, ($1,100,000.00) and the value of the property reconveyed to the plaintiff. The basis for this claim is an alleged fraudulent conspiracy to defraud the creditors of the corporation and a series of alleged transfers in furtherance of the conspiracy.

The first defense is directed to allegations concerning fraudulent transfers and directly controverts all of said allegations in the complaint.

The Second Defense: The second defense is based largely on the rationale of the decision of the court in the case of *Pennington* v. *Leff*, 183 Fed. Supp. 884, decided by the U.S. District Court for the Southern District of Alabama on December 31, 1960. In the *Pennington* case the trustee sought recovery of alleged voidable preferences by corporate bankrupt from guarantors of corporation notes and liability of guarantors, who were officers of the corporation, had been determined, but the amount claimed by the trustee was impractical since it was in excess of claims filed and also in excess of the amount which, if paid, would have avoided bankruptcy. Under the circumstances of the case, the court endeavored on the basis of logic and sound reasoning to determine the amount of liability which was just and fair to all parties involved, and determined the amount to be the difference between the total liabilities of the corporate bankrupt and the total assets on the day bankrupt filed its voluntary petition, plus interest at six per cent from such date together with costs.

The court held at page 890 of the opinion that:

> "The benefits of the bankruptcy statute inure to debtor and creditor, and to the trustee only as he represents the interests of both. No useful purpose would be served in compelling these defendants to pay into the bankrupt estate an amount far in excess of the filed claims and also in excess of the amount which, if paid, would have prevented any necessity of bankruptcy. It is not the purpose of bankruptcy proceedings to punish, but to see that substantial justice is granted to all the creditors."

In the *Pennington* case the trustee claimed in his petition the amount of $63,620.50, which was the amount paid

by the bankrupt to a bank on floor-plan notes after February 25, 1953, when it was claimed that the judgment was insolvent. A voluntary petition was filed on June 25, 1953 and in due course the corporation was adjudicated bankrupt. It was the trustee's contention that the defendant knew, or should have known, that the bankrupt was insolvent at the time the transfers were made to the bank. A total of $22,875.59 in claims was filed by creditors in the bankruptcy proceedings. Unfiled claims which appeared on the bankruptcy schedule amounted to $6,154.43, for a total of $29,030.02 in claims. Thus, the amount claimed by the trustee exceeded the amount of total outstanding claims, both filed and unfiled by $34,590.82, and if the court were to give judgment in the amount asked by the trustee, the total claims would increase to $86,496.09, of which amount the defendants would have a claim of approximately 74%.

The court finally allowed a judgment in the amount of $9,440.29 plus interest at the rate of 6% per annum from June 25, 1953, which amount was the difference between the total assets of $8,165.61 and the total liabilities of $17,866.02 less $260.12 in unfiled claims owing by the bankrupt to the defendant.

In the present case the total assets of the bankrupt amounted to $1,750,955.11 in March of 1959 as evidenced by the schedules filed in the Bankruptcy Court, and the total liabilities amounted to $1,559,217.54, and yet the trustee in the present case brings an action against the defendants seeking a judgment in the amount of One Million One Hundred Thousand Dollars ($1,100,000.00).

If the court is to give judgment in this amount to the trustee, or in the amount of $450,000.00, the total claims would increase to $2,659,217.54 or to $2,009,217.54 depending upon the judgment rendered, of which amount Charles Wilson Tennant, (A.K.A.) Herbert C. Engle, would have

a claim of approximately 100% of the amount in excess of the claims filed. However, since in this case the total assets exceed the total liabilities by $191,737.57 as indicated by the schedules filed in the bankruptcy court the trustee would not have a valid claim for the amount asked for in the present action. Further, to allow such a claim, or judgment, to stand would serve no useful purpose, and if paid, would prevent any necessity of bankruptcy, and would only serve to punish the defendant-appellant.

The Third Defense: The third defense is directed to the claims made in the complaint filed on behalf of the trustee in which it is alleged that pursuant to a conspiracy to hinder, delay and defraud creditors of the King Bee Corporation the defendants wrongfully and fraudulently acquired property in the amount of One Million One Hundred Thousand Dollars.

It must be noted that the involuntary bankruptcy petition relating to the present case was filed on December 8th, 1958 and the corporation was subsequently adjudicated bankrupt on December 26, 1958. The present action was filed on May 12, 1960. Section 70 (e) of the Federal Bankruptcy Act provides as follows:

> "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the federal or state law may permit, institute proceedings in behalf of the estate on any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed, for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or

pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement or in the proceeding or by applicable Federal or State law as the case may be."

The applicable state statute in the present case is Section 1702.31 of the Ohio Revised Code which provides a two year statute of limitations on actions brought by or on behalf of a corporation against any officer or director of a corporation who either directly or indirectly authorizes, makes, or allows any loan or advance to, or overdraft or withdrawal by, an officer, director, or shareholder of such corporation out of its funds otherwise than in the usual course of the business of the corporation and on the usual terms of payment and security.

All of the transfers complained of occurred in 1958, and the present complaint was filed on May 12, 1960, and in view of the two year statute of limitations imposed by the Ohio Statute, all claims based on transfers which took place before May 12th of 1958 would be barred by the statute of limitations.

Further it must be noted that the defendant-appellant had no opportunity to file any motion to make definite and certain the exact dates on which the transfers complained of took place, therefore the defense of the statute of limitations was pleaded in good faith and burden of proof as to the exact date of the transfers would be upon the trustee as plaintiff in the present action.

In *Ken-Mar Airpark Inc.* v. *Toth Aircraft,* 12 F.R.D. 399 (D.C.S.C. Tex., 1961), a motion to set aside a default

judgment was granted by the District Court, Garza, J., who held that the defendant's letter mailed to the plaintiff's counsel in answer to a summons requiring the defendant to serve upon plaintiff's counsel an answer was an appearance within the rule providing that, if a party has appeared in an action, he shall be served with a written notice of an application for a default judgment. It was the duty of the plaintiff to apprise the court of the letter and give notice when seeking a default judgment, and, since the plaintiff failed to do either, the defendant was entitled to have the default judgment set aside.

VIII. ARGUMENT

In the aforementioned cases deciding the application of Rule 60 (b) of the Federal Rules of Civil Procedure we find a review of the various factual situations which have been held to constitute grounds for the granting of a motion to vacate and set aside a default judgment in eight of the Federal Circuits as well as in the District Courts from Texas to Alaska. The underlying philosophy in all of the decisions seems to be the answer to the question "What is appropriate to accomplish justice?" This Court's decision cited in a great number of the decisions was based on a factual situation remarkably similar to the present case in that the defendants in both cases subject to criminal prosecutions and unable to appear, plead, or defend in the civil actions.

The Petitioner in the present case was served with a summons in a civil action while in the custody of the U.S. Marshall awaiting transfer to a federal reformatory to serve a criminal sentence, and, after being taken to the reformatory, a default judgment is taken against him for $450,000.00 in a proceeding of which he had no notice or opportunity to appear and defend as to this claim

made against him. He was without counsel or opportunity to appear himself in the hearing on the motion for a default judgment. It must be remembered that the Petitioner, Charles Wilson Tennant, (A.K.A.) Herbert C. Engle, was only one of three defendants named in the civil action, the other two appeared and were represented by counsel of their own choosing, whereas the Petitioner, Charles Wilson Tennant, (A.K.A.) Herbert C. Engle, had no counsel to represent him, and, even construing the facts in the worst light possible from the standpoint of the Petitioner, it cannot be said that he was guilty of gross neglect, willful default, or was without excuse for not appearing to defend in the hearing on the motion for a default judgment, and this is the reason why we cite the cases in which the motion to vacate under 60 (b) was denied; not to show their applicability, but to show their inapplicability. Now, opposing counsel may suggest that if the present motion were to be granted a considerable delay will be encountered and additional expenses will be incurred by the creditors before the proceedings can be terminated and the estate closed. Let us assume for the sake of argument that there will be some delay involved; the plaintiff cannot be heard to say that the creditors or the estate will be prejudiced in any manner whatsoever.

It is admitted from the facts that no notice of the motion for a default judgment was ever served on the defendant under Rule 55 (b) (2) (See Appendix E). Considering the present motion in light of this rule and the decisions in the *Klapprott, Commercial Casualty, Munter,* and *Butterworth* cases the judgment in question is void.

Considering the present motion under the decisions in the *Chapman, Cremidas, Karahalias, Tozar, Teal* and *Klapprott* cases the defendant was guilty at most of excusable neglect, the plaintiff will not be substantially prejudiced, and the defendant asserts a defense good on its face.

Particularly, in applying the facts in the *Cremidas* Case we have an analogus situation; in that case the defaulting party was in a remote portion of Alaska and was unable to obtain counsel, the defendant in the present case might just as well have been in Alaska as in Milan, Michigan; and he was also unable to obtain counsel.

The great weight of authority seems to favor the setting aside of default judgments so that cases may be decided on their merits and doubt with respect to granting defaults should generally be resolved in favor of trial on the merits.

Rule 5a of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> ". . . but no service need be made on parties in default for failure to answer except that pleadings presenting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4."

Since the present action as initially filed presented a claim against three defendants jointly and asked for mixed equitable and legal relief, was the subsequent motion of the plaintiff for judgment against one of the defendants, who was in default of for failure to answer, seeking only legal relief by way of damages, a "new or additional claim for relief" so as to require service in the manner provided in Rule 4 of the Federal Rules of Civil Procedure?

A reading of the complaint filed on behalf of the Plaintiff reveals that the party defendants in the present action were alleged to have *jointly* (emphasis ours) done the acts which formed the basis for the Plaintiff's cause of action. And it was against all three of these parties jointly that the Plaintiff sought both legal and equitable relief.

A further review of the record (Appendix A-Deft) reveals that the other two defendants filed answers within three weeks after the complaint was filed, and that both

were represented by counsel. Now then, where was the petitioner at this time? It is further apparent that the petitioner was not within the jurisdiction of the court since he had been removed to the confines of the United States Reformatory at Milan, Michigan. Subsequently, the Respondent filed a Motion for a Default Judgment in the amount of $450,000.00 against the petitioner, who was still residing in Milan, Michigan to the knowledge of the respondent.

Now some courts have held that in cases where there are multiple defendants an answer for one is an answer for all under the proper circumstances.

In *Schofield* v. *Palmer* (1904), C.C., 134 F. 753, the court held that:

> "As the common law rule that in joint action judgment must be against all the defendants or against none of them prevails in Virginia, and that the Virginia Statute allowing judgment against less than all the joint contractors did not apply where one of the defendants filed a defense which was not personal but which went to Plaintiff's right of recovery against all the defendants, no judgment could be entered against the defaulting defendants in such case."

Similarly, the courts of Ohio have held that in a case where the makers of a note are sued jointly, and only one of them answers setting up as a defense that the consideration for the note was illegal interest, such defense inures to the benefit of all the defendants. See *Miller* v. *Longacre*, 26 Ohio St. 291.

In the present case the defendants were sued jointly, two of them answered, the third was in default for failure to answer after having been removed from the jurisdiction of the court once he had been served with summons. Subsequently the party in default was proceeded against in a manner somewhat different from that which he might

expect after being served with summons. It was not mixed legal equitable relief which was being sought against this party; it was straight legal relief in the way of damages which was being sought, and against him alone. Was he surprised? Was he put to disadvantage? Was he unable to ask for a continuance? Certainly the answer to these questions must be in the affirmative.

Admittedly the petitioner did not receive notice of the motion for default judgment which was filed by the Trustee.

It is respectfully submitted that under such circumstances the petitioner was entitled to notice of the motion for default judgment since the motion constituted a new or additional claim for relief so as to require service in the manner provided for service of summons in Rule 4 of the Federal Rules of Civil Procedure, and the failure of the appellee to give the notice required of him renders the default judgment rendered against the petitioner void.

It is anticipated that the respondent will assert that "Engle has no meritorious defense and has not acted in good faith."

> "The idea that a court will not relieve from a judgment rendered in proceedings of which the defendant had no notice is obnoxious to our notions of fundamental justice, even though he have no defense on the merits. The Constitution of the United States provides that property shall not be taken without due process of law, and to seize a man's property by virtue of a judgment rendered by a court which never acquired any jurisdiction over the judgment debtor, in an action of which he had no notice and was never accorded an opportunity to be heard in defense thereof, would seem to be nothing less than a taking of property without due process of law. It may be that he had no defense to the action, but the fundamental law of the land secures to him the right to be heard

> in his defense; and, as this right was deemed sufficiently sacred to be protected by constitutional provision, any action of a court in violation of such right is without vestige or shadow of authority, and its pronouncement under such circumstances is not a judicial pronouncement in any sense of the word. However, it is not necessary for us to discuss these fundamental principles which we think demonstrate the unsoundness of the doctrine that a court of equity will not set aside a judgment obtained under such circumstances, as this court has spoken definitely and often upon the very question here presented. It is firmly established in this jurisdiction that where a motion is made in the same case to set aside a judgment void for want of service upon the defendant, no showing in the nature of a meritorious defense is necessary."

Owen J., speaking for the Wisconsin Supreme Court in *Western Pattern & Mfg. Co.* v. *American Metal Shoe Co.*, 175 Wisc., 493, 155 N.W. 535.

Additionally, the court in the *Western Pattern Case* held that:

> "Such a judgment has always been regarded as a mere nullity. It is not a judgment. It is the mere image of a judgment. Its enforcement constitutes the taking of property without due process of law, and will not be tolerated."

To apply the rationale of the *Western Pattern* case to the instant case it would seem that the respondent's argument that the petitioner has no meritorious defense should be disregarded in view of the respondent's failure to give the petitioner notice of the motion for a default judgment which presented a new and additional claim for relief. However, it is the petitioner's contention that he has a meritorious defense and it is that one of the defenses set forth in the answer tendered at the hearing on August 5, 1963, in which it was alleged that the complaint "does not

state a valid claim," does constitute a complete and meritorious defense to plaintiff's cause of action.

Now, the respondent will assert that "Engle's bad faith is shown by his deliberate misstatement and distortion of the facts at page 38 of his brief," and the respondent will further state that "he makes the false statement on the basis of the schedules filed in the Bankruptcy Court (R-38)." (Page 33 — Appellee's Brief)

It is respectfully submitted that Mr. Engle's statements based on the schedules filed in the Bankruptcy Court have foundation in fact and are not false. Respondent himself admits that the statements attributed to Mr. Engle are based on schedules filed in the Bankruptcy Court, schedules of assets, schedules of claims, and appraisals, not receiver's and trustee's accounts.

It is not the intention of the petitioner to mislead a reader by stating facts which form the basis for the defense asserted. It is respectfully submitted that the hearing of August 5, 1963, was a hearing on a motion to vacate and set aside a default judgment and not a hearing on an answer filed on behalf of the petitioner. Admittedly the purpose of the hearing was to permit the petitioner to tender an answer and to present testimony concerning the allegation that the harassing criminal proceedings so preoccupied the appellant's mind that he was not guilty of negligence in failing to present a defense, which was the test embodied in the concurring opinion of Mr. Justice Frankfurter in *Klapprott* v. *U.S.*, 93 L. Ed. 266, cited previously in appellant's brief.

The majority of this Court in the *Klapprott* case held that the judgment in question was void because rendered without proof; that if it was not void, it should be set aside on the ground that the circumstances justified relief as to which the one year limitation provisions attached to relief on the ground of excusable neglect did not apply.

Let us then consder the present case under the test laid down by the majority of this Court in the *Klapprott* case.

Was the judgment in the present case rendered without proof?

Admittedly, the evidence in support of the motion for a default judgment against the appellant consisted of the record of his plea of guilty to a criminal charge of concealing $450,000.00 in Government Bonds.

It is respectfully submitted that such evidence may be accepted as an admission against interest, but it is not conclusive, or a judgment of fact, in a civil case, and may be controverted, and that the default of the petitioner for failure to answer plus evidence of the petitioner's plea of guilty in a criminal case was not sufficient proof to form the basis for a default judgment against the defendant-petitioner in the amount of $450,000.

If the judgment in question is not void, should it be set aside on the ground that the circumstances justified relief on the ground of excusable neglect?

Throughout all of the proceeding in the lower court nothing was said by the court as to whether or not the defendant-appellant was or was not entitled to relief on the grounds of excusable neglect.

What evidence is there that the petitioner willfully or intentionally disregarded the "directive of the summons"? What chance did he have to plead or otherwise defend, or to make an appearance either personally or by an attorney?

The Petitioner is not an attorney, he was not present within the jurisdiction of the Court so as to be able to make an appearance or defend personally. He was in a Federal Reformatory in Milan, Michigan, where his presence in Court to defend a civil action would be quite impossible. Admittedly, he tried to obtain an attorney. And, as recent as July 15, 1963, the court below made reference to the withdrawal of one of the petitioner's counsel as

well as of the fact that the appellant subsequently "was represented by a succession of attorneys."

Additionally, the petitioner testified that he was represented by several attorneys but that he "didn't think that any of them ever represented him." (R-77) Do these facts strip the petitioner of the ground of excusable neglect in support of his motion to vacate and set aside the default judgment? It is respectfully submitted that this question must be answered in the negative.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

ERNESTINE B. POWELL
17 S. High St.
Columbus, Ohio
JOHN J. CONNORS JR.
10 E. Town St.
Columbus, Ohio
FORREST L. BLANKENSHIP
5-6 Masonic Temple Bldg.
Troy, Ohio
Attorneys for Petitioner

APPENDIX A

CIVIL DOCKET

Title of Case

JOHN R. SHRIVER, TRUSTEE

vs.

CHARLES WILSON TENNANT, Alias
HERBERT C. ENGLE,
JEAN E. ENGLE, and
BARBARA M. ELLIS

Attorneys For Plaintiff:

JOHN H. CLIPPINGER

Attorneys For Defendant:

CHAS. E. LESTER, 8 E. 5th St., Newport, Ky., for Jean Engle

GEO. W. RAPP, Eagle Savings Bldg., Cinti. 2, Ohio, for Barbara M. Ellis

BURTON R. SIGNER, 906 Main, Cinti. 2, Ohio, withdrawn — see 4/2/63

BASIS OF ACTION: Sections 70 (e) and other sections of the Act of Congress relating to bankruptcy Recovery by a Trustee in Bankruptcy of Assets of the Bankrupt King Bee Leasing.

JURY TRIAL CLAIMED: Amt. claimed $1,100,000 less the value of any property reconveyed to Plaintiff in accordance with (a) Complaint.

5/12/60 Plaintiff's Account: Taft, Stettinius & Hollister 100/1; Received $15.00
5/13/60 Disbursed $15.00

ABSTRACT OF COSTS: Amount: $15.00; $8.80; $20.00

FILINGS-PROCEEDINGS

5/12/60 Complaint filed.

5/12/60 Summons issued to the U. S. Marshall together with three copies of the Complaint.

5/25/60 Summons returned endorsed "On May 12, 1960, served Charles Wilson Tennant personally, Jean E. Engle, personally, and Barbara Ellis, personally." Mar. Fee $8.80

5/31/60 ANSWER OF JEAN ENGLE, filed.

5/31/60 Answer of Barbara M. Ellis, filed.

11/7/61 Request to enter Default of Charles Wilson Tennant, alias Herbert C. Engle, filed, together with affidavit for Entry of Default.

11/7/61 Entry of Default of Charles Wilson Tennant, alias Herbert C. Engle, filed.

11/8/61 Plaintiff motion for Default Judgment, filed.

11/8/61 Memorandum in support of Motion for Default Judgment.

11/9/61 Motion for Default Judgment Called – Counsel for Plaintiff Present – No Counsel Present on behalf of Defendant – Motion argued by Counsel for Plaintiff – Affidavit of John R. Shriver, Trustee, for Default Judgment filed – Further briefs to be filed –

11/13/61 Memorandum of Plaintiff in support of position that Defendant Charles Wilson Tennant, alias Herbert C. Engle, was not immune from service of civil process, filed.

12/1/61 Default Judgment against defendant for the sum of $450,000, together with costs, filed. Copy mailed to

Charles Wilson Tennant, United States Correctional Institution, Milan, Michigan

11/30/62 MOTION TO SET ASIDE JUDGMENT BY DEFAULT filed by defendant together with ANSWER TO COMPLAINT CIVIL NO. 4608, NOTICE OF MOTION to be heard December 10, 1962, at 2:00 P.M. plus Certificate of Service.

12/5/62 MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE JUDGMENT BY DEFAULT filed by plaintiff.

12/10/60 Hearing on Def. MOTION TO SET ASIDE JUDGMENT BY DEFAULT – argued – Memorandum to be filed by December 20, 1962.

4/2/63 ENTRY OF WITHDRAWAL AS COUNSEL FOR THE DEFENDANT HERBERT C. ENGLE – Burton R. Signer permitted to withdraw as Counsel for Def. Tennant by the defendant and with the consent of this Court – certificate of service to Robt. G. Stachler c/o Taft, Stettinius & Hollister – Dixie Terminal Bldg., Cincinnati, Attorney for plaintiff.

4/22/63 Hearing for final Entry or Trial Setting set for May 13, 1963 – John J. Connor to be Counsel for Defendant – no entry of appearance as yet.

APPENDIX B

In The

DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION
JOHN R. SHRIVER, TRUSTEE,
Plaintiff,

vs.

CHARLES WILSON TENNANT,
(A.K.A.)
HERBERT C. ENGLE
JEAN E. ENGLE,
and
BARBARA M. ELLIS,
Defendants.

Civil No. 4608

COMPLAINT
(Filed May 12, 1960.)

JURISDICTION AND PARTIES

1. Plaintiff is duly qualified and acting as Trustee in Bankruptcy of King Bee Leasing, Inc. (hereinafter referred to as "King Bee"), an Ohio corporation, and Nationwide Automobile Leasing, Inc., (hereinafter referred to as "Nationwide"), a Texas corporation. An involuntary petition in bankruptcy was duly filed against King Bee on December 8, 1958, and said Company was adjudged a bankrupt on December 26, 1958. Plaintiff was duly ap-

pointed Trustee on January 23, 1959. On March 6, 1959, Nationwide, all of the stock of which was owned by King Bee, was adjudicated a bankrupt. On April 27, 1959, the bankruptcy case of King Bee and the case of Nationwide were duly consolidated under Number 25050 in the bankruptcy Court for this District and this Division and plaintiff ordered to act as Trustee of both estates as consolidated. Plaintiff brings this action under Sections 70 (e) and other sections of the Act of Congress relating to bankruptcy.

2. Defendant Charles Wilson Tennant, (A.K.A.) Herbert C. Engle, is a resident of Hamilton County, Ohio. From on or before 1952 until his incarceration in May of 1959, he lived at 7328 Maple Street, Mt. Healthy, Ohio, with his wife and mother-in-law. He is and has been an officer, director and stockholder of King Bee since on or before 1952.

3. Defendant Jean E. Engle is the wife of Charles Wilson Tennant, (A.K.A.) Herbert C. Engle. She is a resident of Hamilton County, Ohio, and at all times pertinent hereto lived at 7328 Maple Street, Mt. Healthy, Ohio. From on or before 1952 until December 1957 she was an officer, director and stockholder of King Bee. In December 1957 she resigned her positions with King Bee to organize and manage a sole proprietorship known as Mid Central Insurance Company. Mid Central Insurance Company was organized for the purposes of brokering insurance for cars and trucks leased out by King Bee and constituted part and parcel of the business of King Bee. After December 1957, although Jean E. Engle was not officially an officer, director or shareholder of King Bee, she continued to act in the same capacities as when she was such an officer and director and continued to profit from its business through her husband and her mother.

4. Defendant Barbara M. Ellis is the mother of Jean E. Engle and the mother-in-law of Charles Wilson Tennant, (A.K.A.) Herbert C. Engle. She is a resident of Hamilton County, Ohio, and at all times pertinent hereto lived at 7328 Maple Street, Mt. Healthy, Ohio. Since on or before 1952 until August 1958, she was an officer, director and shareholder of King Bee.

5. Each of the defendants were actively engaged in the management and control of policies and activities of King Bee. The acts which are alleged herein to have been done by King Bee and Nationwide were authorized, ordered and done by defendants. The acts of defendants, as herein alleged, were done by them jointly and pursuant to the terms of a preconceived and prearranged conspiracy to defraud creditors.

BACKGROUND OF OPERATIONS

6. King Bee was organized on February 15, 1951, under the name of Williams U-Drive-It. On April 22, 1952, its name was changed to King Bee. The business of King Bee principally was to acquire and to lease automobiles and trucks to businesses, to professional people and others. It operated that business from its inception until bankruptcy. From on and after 1952 all of the stock was owned by defendants Tennant (A.K.A.) Engle, Jean E. Engle and Barbara M. Ellis. With a few exceptions, the three defendants constituted the entire Board of Directors of the Company during this period and constituted all of the officers of the Company.

7. King Bee operated from 1951 through 1957 at no substantial profit. In the late fall of 1957 it started to lose money in substantial amounts. On or about January 1, 1958, it owned approximately 200 cars which were either on lease to its customers or available for daily rental to

customers. At such time it was insolvent. It was advised by its accountant and other professional people to contract its operations.

OPERATIONS IN 1958

8. In January, 1958, defendants, acting through King Bee, started a publicity program claiming that it had established a nation-wide leasing business throughout the various large cities in the United States to act as licensees of King Bee Leasing, Inc. They further advised and represented that King Bee needed new automotive units to fill commitments already made for lease contracts. After this promotion, creating the appearance of a nation-wide leasing operation, representatives of King Bee went to various automobile dealers to obtain automobiles and falsely represented that the cars and trucks were to be used in the leasing operation to fill existing leasing contracts. The dealers were told that it was necessary to have credit because the automobiles were to be leased and not sold and that King Bee could not generate the cash to pay for all of the automobiles when they were on lease. Various representations and misrepresentations were made to the dealers to induce them to sell King Bee automobiles and trucks.

9. In order to carry out the above appearances, King Bee took on a large number of new employees, purchased a private plane, hired a pilot, and completely remodeled its offices. All of this was done to give King Bee the appearance of a growing business when, in fact, it was actually losing money and on the verge of bankruptcy.

10. In order to further impress creditors, banks and customers, false balance sheets were drafted by defendants. Such balance sheets misrepresented King Bee's financial condition by various amounts ranging up to approximately One Million Dollars ($1,000,000.00).

11. At least seven automobile dealers were induced to sell automobiles to King Bee on the basis of the above representations and other such representations. The automobiles were then resold and the money converted into cash.

12. For the purpose of furthering the conspiracy to defraud creditors, defendants organized Nationwide in April of 1958. Nationwide was to hold the leasing franchises for the towns of Tyler and Waco, Texas. Although money taken from King Bee was used to organize Nationwide, the stock was listed in dummy names and dummy officers and directors were elected so as to conceal the ownership and management of Nationwide from the creditors of King Bee. Thereupon a contract was entered into between King Bee and Nationwide under which King Bee agreed to sell approximately a half million dollars of automobiles to Nationwide. A note was issued under which the repayment terms ranged up to four years. Automobiles were then transferred to Nationwide. The purpose was to isolate the assets of King Bee from King Bee's creditors.

TRANSFERS

13. The ultimate purpose of the conspiracy, as herein alleged, was to transfer assets of King Bee to the individual defendants for their personal use and thereupon conceal the assets of King Bee from its creditors. Defendants made or suffered transfers to take place which were fraudulent or voidable at times when King Bee had one or more creditors and conspired so to do as follows:

(a) Starting on February 17, 1958, large withdrawals were made by defendants from the bank account of King Bee in the form of Cash, Checks and Cashier's Checks. From February 17, 1958, to November 20, 1958, a total of approximately One Mil-

lion One Hundred Thousand Dollars ($1,100,000.-00) was so withdrawn.

(b) On or about July 9, 1958, Ninety Thousand Dollars ($90,000.00) was withdrawn from three bank accounts belonging to King Bee. This money was transferred to the account of Jean E. Engle which was allegedly a trustee account for Barbara M. Ellis. On March 6, 1958, Fifty Thousand Dollars ($50,-000.00) was withdrawn from the King Bee account by Herbert C. Engle. This money was deposited on or about April 2, 1958, in an account at the Citizens National Bank of Tyler under a fictitious name. On or about April 22, 1958, Forty Thousand Dollars ($40,000.00) of this amount was transferred to an account listed in the joint names of Herbert C. Engle and Jean E. Engle in the Citizens National Bank of Waco, Texas. After being used for personal purposes, the balance of approximately Twenty-Two Thousand Dollars ($22,000.00) was then transferred to said account of Jean E. Engle in the Citizens First National Bank of Tyler, Texas, which was allegedly a trustee account for Mrs. Ellis. This Twenty-Two Thousand Dollars ($22,000.00) was then commingled with the Ninety Thousand Dollars ($90,000.00) referred to above. On or about July 29, 1958, Jean E. Engle withdrew Sixty-Five Thousand Dollars ($65,000.00) from this account in the form of two cashier's checks. She took these two cashier's checks to the Citizens National Bank of Waco, Texas, and exchanged them for a cashier's check in the amount of Sixty-Five Thousand Dollars ($65,000.00). She next took this cashier's check across the street to the National Bank of Waco, Texas, and pledged it as collateral for a loan in the

amount of Sixty-Five Thousand Dollars ($65,000.00). The National Bank of Waco, Texas, then issued its checks aggregating Sixty-Five Thousand Dollars ($65,000.00) in exchange for a note signed in the name of Barbara M. Ellis for Sixty-Five Thousand Dollars ($65,000.00) and such collateral. The checks of the First National were payable to and were then delivered to the owners of the Plaza Hotel of Tyler, Texas. Such owners then transferred the title of said hotel to Barbara M. Ellis. The above was done pursuant to an agreement of said defendants.

(c) On or about September 16, 1958, Fifty-Thousand Dollars ($50,000.00) and other money was withdrawn from the King Bee account at Tyler, Texas. This was combined with One Hundred Ninety-Five Thousand Dollars ($195,000.00) which was withdrawn from such account on October 16, 1958, with Fifteen Thousand Dollars ($15,000.00) withdrawn from the King Bee account at The Central Trust Company, with One Hundred Fifteen Thousand Dollars ($115,000.00) which was withdrawn on October 28, 1958, from a Nationwide account, with Ten Thousand Dollars ($10,000.00) withdrawn from a Nationwide account at Tyler, and with other money taken from the accounts of King Bee and Nationwide. These moneys were used to purchase Four Hundred Fifty Thousand Dollars ($450,000.00) face value United States Treasury Bonds from the Republic National Bank in Dallas, Texas. The defendants are presently concealing all but one of these bonds.

(d) Additional amounts of said money referred to above were used by defendants to purchase houses in Texas, 1134 and 1138 East Dawson Street, Tyler, Texas, to purchase furniture, fixtures, supplies, equipment and

other items for the Hotel Plaza, to purchase seven (7) automotive units from King Bee, to purchase furniture and fixtures, equipment and other items for said houses, to purchase personal items, and to purchase other assets.

14. At the time of said transfers King Bee was insolvent, there were creditors of King Bee in existence, and such creditors have claims against the bankrupt provable under the Act of Congress relating to bankruptcy. Said transfers were made without fair consideration. Defendants know all of the foregoing.

15. The purposes of said transfers and said conspiracy was to hinder, delay and defraud the creditors of King Bee.

16. By reason of said transfers and conspiracy said defendants wrongfully and fraudulently acquired property belonging to King Bee in the amount of approximately One Million One Hundred Thousand Dollars ($1,100,000.00).

WHEREFORE plaintiff prays as follows:

(a) That defendants be ordered to convey to plaintiff the Plaza Hotel, the two houses on East Dawson Street, Tyler, Texas, said furniture, fixtures, supplies and equipment and any other property which was purchased or acquired with the money or assets of King Bee or which property belongs to King Bee, any any other property into which said property may have been converted;

(b) That a judgment be entered against the defendants and each of them for the difference between the amount of One Million One Hundred Thousand Dollars ($1,100,000.00) and the value of any property reconveyed to plaintiff in accordance with (a) above;

(c) For the costs of this suit; and

(d) Such other and further relief to which plaintiff may be entitled either at law or in equity.

JOHN J. CLIPPINGER
603 Dixie Terminal Building
Cincinnati, Ohio
Attorney for Plaintiff

OF COUNSEL
TAFT, STETTINIUS & HOLLISTER

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
JOHN R. SHRIVER, TRUSTEE,
Plaintiff,

vs.

CHARLES WILSON TENNANT,
(A.K.A.)
HERBERT C. ENGLE,
JEAN E. ENGLE,
and
BARBARA M. ELLIS,
Defendants.

Civil Action File No. 4608

SUMMONS
(Filed May 12, 1960.)

To the above named Defendants:

You are hereby summoned and required to serve upon JOHN H. CLIPPINGER, plaintiff's attorney, whose ad-

dress is 603 Dixie Terminal Building, Cincinnati 2, Ohio, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JOHN D. LYTER
Clerk of Court
/s/ PATRICK FITZPATRICK
Deputy Clerk

Date: May 12, 1960

APPENDIX C

In The
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN R. SHRIVER,, TRUSTEE IN BANKRUPTCY,
Plaintiff,

vs.

CHARLES WILSON TENNANT,
(A.K.A.)
HERBERT C. ENGLE, et al.,
Defendants.

CIVIL ACTION NO. 4608

MOTION FOR DEFAULT JUDGMENT
(Filed November 8, 1961.)

1. Now comes the plaintiff, John R. Shriver, Trustee in Bankruptcy of King Bee Leasing, Inc. and Nationwide

Automobile Leasing, Inc., and moves the court to enter default judgment in favor of plaintiff and against Charles Wilson Tennant, (A.K.A.) Herbert C. Engle, one of the defendants herein, in the above entitled cause.

2. Plaintiff states that the Complaint in the above cause was filed in this court on May 12, 1960; the Summons and Complaint were personally served on defendant, Charles Wilson Tennant, (A.K.A.) Herbert C. Engle, on May 12, 1960; no answer or other defense has been filed by said defendant; default was entered against said defendant in the civil docket in the office of this court on November 7, 1961; no proceeding have been taken by said defendant since default was entered and said defendant is not in the military service as appears in the affidavit of Murray S. Monroe hereto attached as Exhibit "A".

3. Plaintiff states that in his Complaint filed herein he alleged that property belonging to the bankrupt corporations valued at approximately $1,100,000 was wrongfully and fraudulently acquired by the defendants herein and in his prayer he sought to recover certain real and personal property which was purchased or acquired with the money or assets of the bankrupt corporations or which property belonged to said bankrupt corporations and he sought to obtain a judgment against the defendants and each one of them for the difference between the amount of $1,100,000 and the value of any property reconveyed to plaintiff by order of this court.

4. Plaintiff states that on May 12, 1960, Charles Wilson Tennant, (A.K.A.) Herbert C. Engle, one of the defendants herein, did enter a plea of guilty on an indictment returned by the Federal Grand Jury charging:

> "That on or about December 26, 1958, and thereafter until the return of this indictment, at Cincinnati, in the Southern District of Ohio, Western Division, CHARLES WILSON TENNANT, (A.K.A.) Herbert

C. Engle, did knowingly and fraudulently conceal property belonging to the estate of a bankrupt from John R. Shriver, an officer of the United States District Court for the Southern District of Ohio, as a Receiver appointed December 8, 1958, and as a Trustee appointed January 23, 1959, in a bankruptcy proceeding concerning the King Bee Leasing, Inc. and subsequently the Nationwide Leasing, Inc., respectively, bankrupts, in Bankruptcy Case Number 25050, consolidated, pending then and now before the Referee in Bankruptcy at Cincinnati, Ohio, in the United States District Court, and as such officer of the court charged with the control and custody of property belonging to said bankrupts; in that said defendant did acquire by purchase certain United States Treasury Bearer Bonds, Series 1967-72, in the principal aggregate amount of $450,000.00, with funds, assets and cash belonging to and the property of the said bankrupts, said bonds and property so purchased being retained after purchase by the said defendant and in concealment from the said officer of the court; in violation of Section 152, Title 18, United States Code."

5. Plaintiff further states that after the said Complaint was filed herein, certain property described in the said complaint including the Plaza Hotel, the two houses on East Dawson Street, Tyler, Texas, the furniture, fixtures, supplies and equipment has been conveyed and transferred to the plaintiff; and that the total value of said property recovered by plaintiff was less than said $1,100,000 by an amount of at least $450,000 which has not been recovered by plaintiff by reason of said defendant's continual concealment of the United States Treasury Bearer Bonds, and which amount plaintiff seeks to recover herein by default judgment.

WHEREFORE, plaintiff moves the court to enter a default judgment against defendant Charles Wilson Ten-

nant, (A.K.A.) Herbert C. Engle, for $450,000 and for the costs of this suit.

/s/ ROBERT G. STACHLER
Attorneys for Plaintiff
603 Dixie Terminal Bldg.
Cincinnati, Ohio

APPENDIX D

In The
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN R. SHRIVER, TRUSTEE IN BANKRUPTCY,
Plaintiff,

vs.

CHARLES WILSON TENNANT,
(A.K.A.)
HERBERT C. ENGLE, et al.,
Defendants,

Civil Action No. 4608

DEFAULT JUDGMENT AGAINST
DEFENDANT CHARLES WILSON TENNANT,
(A.K.A.)
HERBERT C. ENGLE
(Filed December 1, 1961.)

This cause came on for hearing at this term on the motion of John R. Shriver, Trustee in Bankruptcy of King

Bee Leasing, Inc. and Nationwide Automobile Leasing, Inc., plaintiff in the above-entitled action, for a default judgment, pursuant to Rule 55(b)(2), Federal Rules of Civil Procedure, and it appearing to the court that the complaint in the above cause was filed in this court on May 12, 1960 and that the summons and complaint were duly served on defendant Charles Wilson Tennant, (A.K.A.) Herbert C. Engle, on May 12, 1960 and that no answer or other defense has been filed by the said defendant and that said defendant has never made an appearance, either personally or by an attorney or representative, in this case; and that default was entered against said defendant on November 7, 1961 in the Office of the Clerk of this Court and that no proceedings have been taken by said defendant, and that the court has jurisdiction over the subject matter of this action and the parties herein and that the said defendant is indebted to the plaintiff in the amount of $450,000, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff recover from defendant Charles Wilson Tennant, (A.K.A.) Herbert C. Engle, the sum of $450,000 together with costs herein.

/s/ JOHN W. PECK
United States District Judge

/s/ MURRAY S. MONROE
/s/ ROBERT G. STACHLER
Attorneys for Plaintiff

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN R. SHRIVER, TRUSTEE IN BANKRUPTCY,
Plaintiff,

vs.

CHARLES WILSON TENNANT,
(A.K.A.)
HERBERT C. ENGLE, et al.,
Defendants,

Civil Action No. 4608

MEMORANDUM OPINION
(Filed December 10, 1962.)

There has been pending in this court since November 30th, 1962, a motion to set aside a default judgment entered herein December 1st, 1961. Subsequent to its filing, the attorney who submitted the motion was permitted to withdraw as counsel for the defendant, Charles Wilson Tennant, (A.K.A.) Herbert C. Engle, and subsequently he was represented by a succession of attorneys. Somewhere along the line defendant's present counsel entered their appearance and after one or two continuances requested by them the motion was set for hearing at a stated hour on a day certain. When the motion was called, no response

was made by the defendant or on his behalf, and an entry denying the motion was filed.

Subsequently an explanation which is hereby accepted by the Court was presented by defendant's counsel concerning the lack of response to the call, accompanied by a motion to vacate is felt to be well taken, and an entry granting it may be presented. The granting of that motion places the motion to set aside the default judgment again before us, and it is the subject of consideration in this memorandum.

The motion which is thus presented is supported by a lengthy memorandum replete with authorities supporting the time-honored principle that doubts should be resolved in favor of setting aside defaults so that cases may be decided on their merits where defendant appears to have a meritorious defense available. That this principle was recognized to be the law is indicated by the following excerpt from the transcript of the hearing on the motion for default judgment (November 9, 1961):

> "MR. STACHLER (attorney for the plaintiff): . . . I am satisfied that if Mr. Engle (the defendant) upon his release from prison makes an effort to set aside this judgment, even though there is some defect in giving him notice, I think under Rule 60 of the Federal Rules he must show that he has a defense, and I can't see how he would ever satisfy that requirement . . .
>
> "THE COURT (the writer presiding): On that point, Mr. Stachler, I would feel better about the situation if it would be possible for him to set it aside if there is any impropriety in granting the motion. I would prefer that he is not entirely precluded if there is any question about the propriety of the judgment."

To date there has never been the slightest hint in any of the extensive written and oral representations that have been made suggesting the availability of any defense, and we would feel justified in denying the present motion on that ground. However, in perhaps an over-abundance of caution and to preclude the most remote possibility of injustice to the defendant, we are resetting the motion for additional hearing on the date hereinafter indicated.

At or prior to that hearing it is requested that defendant tender an answer setting forth any defense or defenses he may have. Additionally, to the extent that the parties may desire to offer witnesses, testimony may be presented concerning the allegation that harassing criminal proceedings against the defendant so preoccupied his mind that he was not guilty of negligence in failing to present a defense; concerning any intervening equities that may have come into existence between December 1st, 1961 and November 30th, 1962; and concerning any other subjects that the parties may feel germane to the present issue.

The defendant's Motion to Set Aside Judgment by Default will be before the Court for rehearing at 1:30 o'clock P.M., August 5th, 1963.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN R. SHRIVER, TRUSTEE,
Plaintiff,

vs.

CHARLES WILSON TENNANT,
(A.K.A.)
HERBERT C. ENGLE,
JEAN E. ENGLE,
and
BARBARA M. ELLIS,
Defendants,

Civil Action No. 4608

ANSWER
(Filed August 3, 1963.)

Now comes the defendant, Charles Wilson Tennant, (A.K.A.) Herbert C. Engle, and for his answer to the complaint herein:

1. Admits the allegations set forth in paragraph one of the complaint;

2. Admits the allegations set forth in paragraph two of the complaint;

3. Admits the allegations set forth in paragraph three of the complaint, but denies that Jean E. Engle derived

any profit from its business through her husband and mother;

4. Admits the allegations set forth in paragraph four of the complaint;

5. Denies the allegations set forth in paragraph five of the complaint;

BACKGROUND OF OPERATIONS

6. Admits the allegations set forth in paragraph six of the complaint;

7. Denies the allegations set forth in paragraph seven of the complaint, but admits that King Bee operated from 1951 to 1957;

OPERATIONS IN 1958

8. The defendant admits that in January of 1958 King Bee started a publicity program to establish a nationwide leasing operation, but the defendant denies all other allegations contained in this paragraph.

9. The defendant admits that King Bee took on a number of new employees, purchased a private plane, hired a pilot, and remodeled its offices, but the defendant denies all other allegations in this paragraph.

10. For want of knowledge the defendant denies the allegations set forth in paragraph ten of the complaint;

11. The defendant denies the allegations set forth in paragraph eleven of the complaint;

12. The defendant admits that in April of 1958 he organized Nationwide Automobile Leasing, Inc., and that a contract was entered into between King Bee and Nationwide under which King Bee agreed to sell approximately a half million dollars of automobiles to Nationwide. The defendant further admits that a note was issued as payment for said automobiles and that said automobiles were trans-

ferred to Nationwide. The defendant denies all other allegations contained in paragraph twelve of the complaint.

TRANSFERS

13. The defendant denies the allegations set forth in paragraph thirteen of the complaint;

14. The defendant denies the allegations set forth in paragraph fourteen of the complaint;

15. The defendant denies the allegations set forth in paragraph fifteen of the complaint;

16. The defendant denies the allegations set forth in paragraph sixteen of the complaint;

and for his first defense the defendant says that all transfers were for valid corporate purposes, authorized by the Board of Directors, and made on behalf of the corporation.

For his second defense the defendant says that the complaint does not state a valid claim.

For his third defense the defendant says that said claim is barred by the statute of limitations.

WHEREFORE, the defendant prays that the complaint be dismissed and that he may go hence without costs.

STATE OF OHIO)
)
COUNTY OF HAMILTON)

Charles Wilson Tennant, (A.K.A.) Herbert C. Engle, being duly sworn says that he is a defendant in the present action and that he has read the foregoing answer, and that the facts and matters contained herein are true as he verily believes.

/s/ Herbert C. Engle

Sworn to before me and subscribed in my presence this 5th day of August, 1963.

/s/ John J. Roddy, Notary
John J. Connors, Jr.
Attorney at Law
10 E. Town Street
Columbus 15, Ohio
Attorney for Defendant

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN R. SHRIVER, TRUSTEE IN BANKRUPTCY,
Plaintiff,

vs.

CHARLES WILSON TENNANT,
(A.K.A.)
HERBERT C. ENGLE, et al.,
Defendants,

Civil Action No. 4608

MEMORANDUM OPINION AND ORDER
(Filed August 8, 1963.)

Subsequent to a series of circumstances reviewed in a Memorandum Opinion filed herein July 15th, 1963, this cause came on for hearing on a motion of the defendant Charles Wilson Tennant, (A.K.A.) Herbert C. Engle, to set aside a default judgment against him. The motion was thoroughly briefed by counsel, and at the hearing testimony

was heard from several witnesses, including said defendant, and oral arguments were presented.

The testimony received was directed to the contention of the defendant that at the time of the service of summons herein upon him he had been in penal custody for a period in excess of thirteen months, and was then under sentence imposed in this court. The evidence indicated that the conditions of confinement were neither abnormal nor unusual, and it was further disclosed that the defendant had been subject to penal confinement in other places at other times, had a substantial history of legal personal difficulties, and in general did not indicate that defendant was the type of innocent and naive individual who might be so distraught under the circumstances as to be unable to understand his situation. On the contrary, there is every reason to believe that at the time of service of summons and thereafter this defendant was in full control of his faculties, had a full understanding of the need for presenting any available defense, but failed to do so; we so find.

At the direction of the court by entry dated July 29th, 1963, defendant tendered an answer setting forth his alleged defenses. Having now fully considered the answer tendered we are of the opinion that no defense is therein pled as a matter of law, and it is so concluded.

In accordance with the foregoing,

IT IS ORDERED, this Court finding as a matter of fact that defendant was neither incapable of nor prevented from presenting a defense and concluding that he has failed to indicate the existence of any defense as a matter of law, that the Motion to Set Aside Judgment by Default should be and it is hereby overruled, with notation of the defendant's exceptions.

/s/ John W. Peck
District Judge

APPENDIX H

15604

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN R. SHRIVER, TRUSTEE,
Plaintiff-Appellee,

vs.

CHARLES WILSON TENNANT,
(A.K.A.)
HERBERT C. ENGLE,
Defendant-Appellant.

ORDER

(Filed September 21, 1964.)

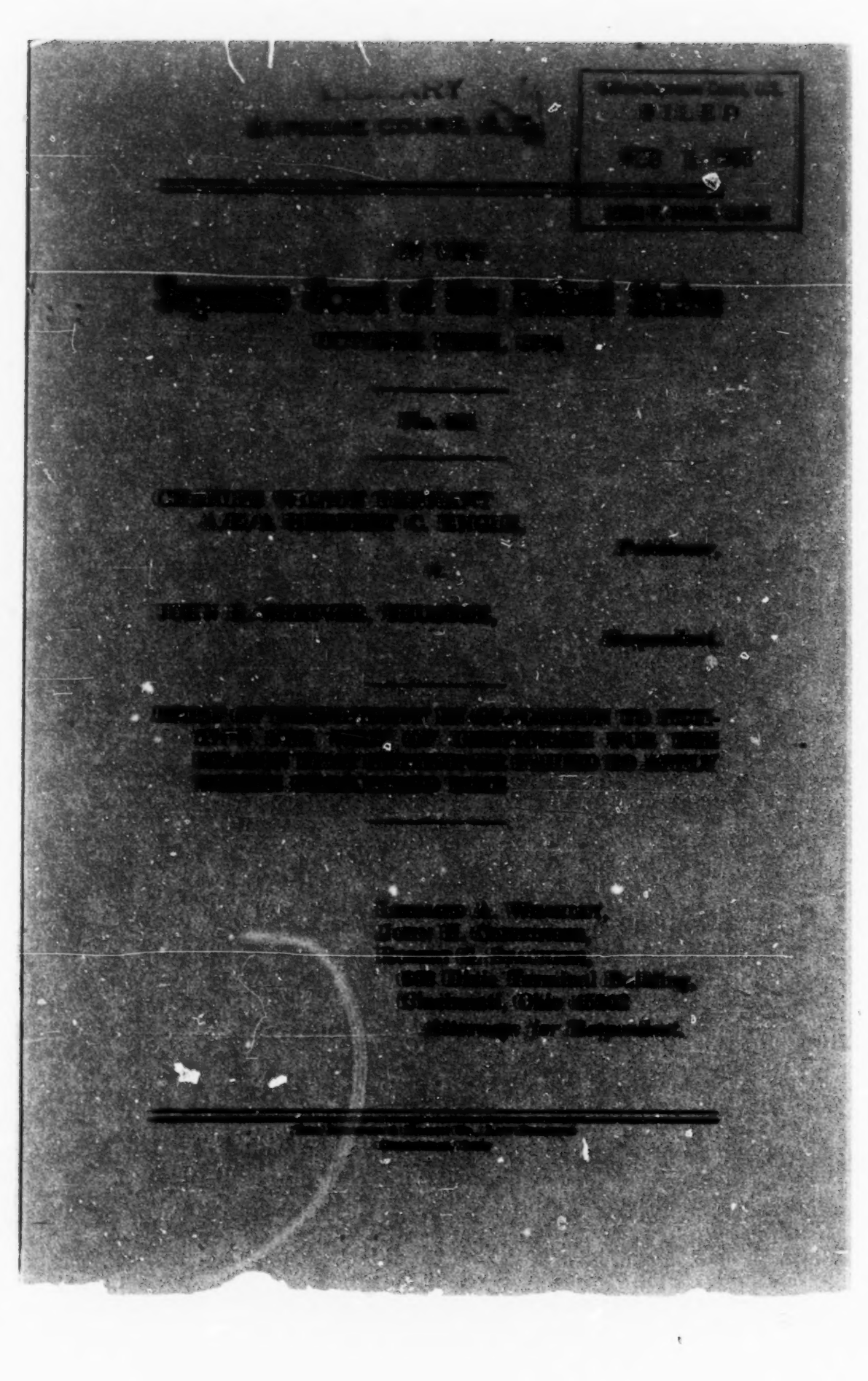
Before O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

THIS CAUSE came on to be heard upon the record and the briefs and arguments of counsel. Upon due consideration thereof it appears that appellant's appeal is without merit.

NOW, THEREFORE, IT IS ORDERED that the judgment of the District Court be and it is hereby affirmed.

Approved for entry.

/s/ Clifford O'Sullivan
U. S. Circuit Judge



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 811

CHARLES WILSON TENNANT
A/K/A HERBERT C. ENGLE,

Petitioner,

v.

JOHN R. SHRIVER, TRUSTEE,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR THE REASON THAT PETITIONER FAILED TO APPLY WITHIN PRESCRIBED TIME

QUESTION PRESENTED

The sole question presented by Respondent at this time is whether this Court has jurisdiction to entertain the untimely Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

On September 21, 1964 the Sixth Circuit Court of Appeals rendered an opinion and entered judgment in the case. The opinion is reported in 336 F. 2d 807. Thereafter, on December 17, 1964 Petitioner submitted to this

Court by telegram a request for an extension of time in which to apply for a writ of certiorari. Mr. Justice Goldberg extended the time from December 21, 1964 to January 4, 1965. The Petition for Writ of Certiorari, however, was not filed by Petitioner until January 6, 1965, which date was after the expiration of the extension period granted by this Court, and, of course, more than ninety (90) days since the entry of the judgment by the Court of Appeals. No other application for an extension of time has been made to this Court and no other extension has been granted by a Justice of this Court in the case.

Petitioner failed to notify Respondent that Mr. Justice Goldberg granted an extension of time to January 4, 1965 even though Rule 34.4 of this Court explicitly required that prompt notification of such action be given to Respondent by Petitioner. Moreover, Petitioner did not comply with Rule 21.2 of this Court which required that he notify Respondent, on a form supplied by the Clerk, of the date of filing, of the docket number of the case, and of the contents of the record filed with the Court. This information had to be obtained from the Clerk of this Court by Respondent.

ARGUMENT

The time fixed by statute for filing a petition for certiorari in a case such as the instant one is set forth in 28 U.S.C. Sec. 2101(c) (1949) as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for *within ninety days after the entry of such judgment or decree.* A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days." (Emphasis added)

Rule 22.3 of this Court provides that the petition for certiorari shall be deemed in time when it and the certified record are filed with the Clerk "within the time prescribed by law." In addition to Rule 22.3 the other applicable Rule of this Court to the question presented is Rule 34.2, which reads as follows:

> "Whenever any justice of this court is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or file in this court his record on appeal or any brief or paper, *an application seeking such extension shall be timely if it is presented to the clerk within the period sought to be extended.* The clerk will refuse to receive any application for extension sought to be presented after expiration of such period." (Emphasis added)

The purpose of establishing such time limitations was recognized in *Matton Steamboat Co.* v. *Murphy* (1943), 319 U.S. 412, 87 L. Ed. 1483, where the Court, in a per curiam opinion, stated:

> "The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."

As early as 1945, in *Commissioner of Int. Rev.* v. *Bedford* (1945), 325 U.S. 283, 89 L. Ed. 1611, this Court expressed its feeling as follows:

> "In these days of rapid communication the statutory allowance of three months [now ninety days] is more than ample for an unsuccessful litigant to determine whether to seek further review." (325 U.S. at 288, 89 L. Ed. at 1616; insert added)

This Court has consistently and uniformly held that it lacks jurisdiction to entertain an untimely petition for writ of certiorari. In *Federal Trade Com.* v. *Minneapolis-Honeywell R. Co.* (1952), 344 U.S. 206, 97 L. Ed. 245, Mr. Chief Justice Vinsón delivering the opinion of the Court stated that "the initial question in this case is one of jurisdiction—whether the petition for certiorari was filed within the period allowed by law." In denying the petition because the Court lacked jurisdiction, Mr. Chief Justice Vinson further stated at 97 L. Ed. 252-253 (343 U.S. 213):

> ". . . we do mean to encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end. *It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period.*" (Emphasis added)

Likewise, this Court in *Department of Banking* v. *Pink* (1942), 317 U.S. 264, 87 L. Ed. 254, reh. den. (1943), 318 U.S. 802, 87 L. Ed. 1166, for want of jurisdiction, denied the petition for certiorari which was filed more than three months after the entry of the judgment of the state court. On this point it was stated in a per curiam opinion at 87 L. Ed. 256 (317 U.S. 266-267):

> "Accordingly we must deny the petition for certiorari on the ground that it was not filed within the time provided by law."

Accord, United States v. *Lippmann* (1922), 260 U.S. 742, 67 L. Ed. 491; *Rust Land & L. Co.* v. *Jackson* (1919), 250 U.S. 71, 63 L. Ed. 850; *Toledo Scale Co.* v. *Computing Scale Co.* (1922), 261 U.S. 399, 67 L. Ed. 719.

The Petition for Writ of Certiorari in the instant case was filed after January 4, 1965, the last day of the period of extension. No Justice of this Court ever extended the

time for applying for a writ of certiorari beyond January 4, 1965. Furthermore, no application was ever presented by Petitioner to extend the date beyond January 4, 1965. According to the Rules of this Court the period in which Petitioner could have made application for a second extension of time in which to file his petition for certiorari expired on January 4, 1965. Rule 34.2 unequivocably provides that "an application seeking such extension shall be timely if it is presented to the clerk [of the Supreme Court] within the period sought to be extended." With respect to the instant case, a second application of Petitioner for additional time, therefore, had to be presented within the period prior to January 4, 1965, since this date was the termination date of the period in which Petitioner could have "sought to be extended" within the purview of Rule 34.2.

It is clear, therefore, from a perusal of the statute and the Rules of this Court, that the Petition for Writ of Certiorari in the instant case was filed untimely and that the period of time in which Petitioner had to apply for an additional extension has already expired. Consequently, according to the decisions and precedent of this Court, the Court now lacks jurisdiction to entertain the Petition and must deny it.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LEONARD A. WEAKLEY,
JOHN H. CLIPPINGER,
ROBERT G. STACHLER,
603 Dixie Terminal Building,
Cincinnati, Ohio 45202
Attorneys for Respondent.

January 28, 1965.